

110.3.7 Environmental Impairment If required by Special Provision, the Contractor shall carry Environmental Impairment insurance to cover the risk of sudden or accidental discharge of pollutants during the prosecution of the Work. The limits of liability for this coverage shall be in the amount of \$1,000,000.00 per occurrence and \$2,000,000.00 in the Aggregate. Regardless of whether such insurance is carried by the Contractor, the Contractor is responsible for managing these risks as it deems appropriate.

### 110.3.8 Administrative & General Provisions

A. Additional Insured Each policy with the exception of Workers' Compensation and Professional Liability insurance shall name the Department of Transportation as an additional insured.

B. Defense of Claims Each insurance policy shall include a provision requiring the carrier to investigate, defend, indemnify, and hold harmless all named insureds against any and all claims for death, bodily injury, or property damage, even if groundless.

C. Primary Insurance The insurance coverage provided by the Contractor shall be primary insurance with respect to the State, its officers, agents, and employees. Any insurance or self-insurance maintained by the State for its officers, agents, and employees is in excess of the Agent's insurance and shall not contribute with it.

D. Reporting Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the State, its officers, agents, and employees.

E. Separate Application The insurance provided by the Contractor shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

## SECTION 111 - RESOLUTION OF DISPUTES

Scope of Section This Section contains provisions for resolving Disputes early, efficiently, fairly, and as close to the Project level as possible. For related provision, see Section 104.4 - Communication and Coordination.

### 111.1 General

**111.1.1 Definitions** "Dispute" is defined in Section 101.2 - Definitions. An "Issue," as used in Sections 111.1 through 111.3 below, is a matter that may give rise to a Dispute, but has not yet been negotiated as provided in Section 104.4.5 - Early Negotiation.

**111.1.2 Escalation Process** To resolve Issues or Disputes, the Contractor and the Department may mutually agree in writing at any time to any form of Dispute resolution including mediation, facilitated negotiation, neutral case evaluation, arbitration, or litigation.

In the absence of such written Agreement, the parties must pursue resolution of Issues or Disputes that arise after Contract Execution as follows: (A) first through negotiation at the Project level as provided in Sections 104.4.5 - Early Negotiation and 111.2 - Project Level Negotiation, (B) next through negotiation by management as provided in Section 111.3 - Negotiation by Management, (C) next, if the parties consent, through a Dispute Review Board as provided in Section 111.4 - Dispute Review Board, and (D) next through the Commissioner as set forth in Section 111.5 - Appeal to Commissioner. If the Dispute remains unresolved after final agency action by the Commissioner, then, and only then, may a party seek judicial review of a Dispute as provided in Section 111.6 - Judicial Review.

**111.1.3 Relationship to Partnering** Partnering, including the establishment of a partnership charter, does not in any way waive, alter, or otherwise affect any provision of the Contract including those requiring notice and all other provisions governing the resolution of Issues or Disputes. For a related provision, see Section 104.4.1 - Partnering.

**111.1.4 Mandatory Notice** The Contractor shall comply with all notice provisions of this Contract relating to Issues or Disputes including those contained in Sections 104.3.3 - Duty to Notify If Ambiguities Discovered; 104.4.5(A) - Early Negotiation, Notice Required; 109.4.3 - Differing Site Conditions, Notice and Procedural Requirements; 109.5.4 - Adjustments for Delay, Notice and Procedural Requirements; and 111 - Resolution of Disputes. In order to promote the purposes of this Section 111, all notice provisions are mandatory and are to be strictly construed. Failure to provide Conforming notice constitutes waiver by the Contractor of any and all claims to additional compensation, time, or modification of Contract requirements related to the Issue or Dispute. Such waiver of claims shall not be affected by the Department's willingness to enter into discussions or negotiations regarding Issues or Disputes for which the

Contractor failed to provide proper notice.

111.1.5 Work to Proceed Despite Issue or Dispute Regardless of the status or disposition of any Issue or Dispute, the Contractor and the Department must perform their Contractual responsibilities Promptly and diligently. Unless expressly directed otherwise by the Department, the Contractor shall proceed without Delay to perform the Work or to Conform to the decision or Order of the Department.

111.1.6 Contractor's Obligation to Keep Records Throughout the course of any Issue or Dispute, the Contractor shall keep daily records, including supporting documentation, of extra costs and time related to the Issue or Dispute. Such records shall include all non-salaried labor, Material costs, Equipment expenses, and location for all operations that are affected by the Issue or Dispute. The Contractor will not be entitled to any change to compensation, time, or Work requirements without such records. The Contractor shall permit the Department daily access to and shall provide copies of these and any other records needed for evaluating the Dispute. The Contractor shall retain those records for the duration of the Dispute and as provided in Section 104.3.6 - Project Records.

111.1.7 Dispute Resolution Time Extensions All deadlines provided in this Section 111 may be extended only by mutual written consent signed by both parties.

111.1.8 Commissioner Communications Before Appeal Because the Commissioner may hear an Appeal and render final agency action under Section 111.5 - Appeal to Commissioner, the following persons shall not communicate with the Commissioner regarding the substance of a Dispute, except upon notice and opportunity for all parties to participate: (A) the Contractor or any agent for the Contractor and (B) Department staff, counsel, or consultants who are directly participating in Dispute resolution processes in an advocate capacity. The preceding sentence does not prohibit the Commissioner from communicating with, or having the aid or advice of all other Department staff, counsel, or consultants.

111.1.9 Contract Modification Required All changes to the Contract that regard Issues or Disputes and that affect compensation, time, quality, or other Contract requirements must be made by written Contract Modification as provided by Section 109.8 - Contract Modification.

## 111.2 Project Level Negotiation

111.2.1 Early Negotiation The parties must first comply with all requirements of Section 104.4.5 - Early Negotiation.

111.2.2 Detailed Notice of Dispute If Early Negotiation fails to resolve the Issue within 45 Days of the date of Receipt of the written Notice of Issue for Consideration Conforming to Section 104.4.5(A) - Early Negotiation, and if the Contractor desires additional consideration by the Department, then the Contractor must Deliver a written Detailed Notice of Dispute to the Program Manager within 14 Days of the expiration of said 45-day period. At a minimum, the Detailed Notice of Dispute shall include all of the following information in sufficient detail to allow reasoned analysis as determined by the Program Manager:

A. A description of the background of Dispute including the date(s) the Issue or Dispute first arose and the date the Contractor provided the Project Manager or Resident with the "Notice of Issue for Consideration" Conforming to Section 104.4.5(A) - Early Negotiation;

B. All Contract provisions that are relevant to the Dispute;

C. All facts relevant to the Dispute including all non-Contract Documents and all non-documentary facts including identification of all persons with knowledge of relevant facts and a synopsis of their testimony;

D. The Contractor's position as to why the Contract and facts demonstrate that the Contractor is entitled to additional compensation and/or time;

E. The estimated dollar cost, if any, of the Disputed Work and how the estimate was determined;

F. If the Contractor is asserting an Excusable or Compensable Delay occurred, an analysis of the progress schedule showing the impact on the Critical Path; and

G. A specific request for additional compensation or time, or other change to provisions of the Contract.

111.2.3 Decision by Program Manager Within 30 Days of receiving a Detailed

Notice of Dispute Conforming to Section 111.2.2 - Detailed Notice of Dispute, the Program Manager will Deliver a written decision to the Contractor on the specific request made.

### 111.3 Negotiation by Management

111.3.1 Notice of Unresolved Dispute If the Contractor desires additional consideration, the Contractor shall Deliver a written "Notice of Unresolved Dispute" to the Department's appropriate Bureau Director (hereafter "Director" in this Section 111 - Resolution of Disputes within 14 Days of receiving the Program Manager's decision provided for in Section 111.2.3 - Decision by Program Manager.

At a minimum, the Notice of Unresolved Dispute must include the following information in sufficient detail to allow reasoned analysis as determined by the Director or the director's designee(s): A) all documentation submitted to the Resident for Project-level negotiation, (B) all decisions rendered by the Program Manager or equivalent Bureau level manager, and (C) all additional information the Contractor desires the Department to consider.

111.3.2 Additional Documentation Within 14 Days of the receiving a Notice of Unresolved Dispute Conforming to Section 111.3.1, the Director or the Director's designee(s) may require the Contractor to provide Additional Documentation. If required, the Contractor shall completely and accurately supply all requested information in writing within 21 Days of receiving said request. Failure to provide all Additional Documentation constitutes a waiver of all claims for additional compensation or time.

Additional Documentation may include the following.

- A. The date(s) on which facts arose which gave rise to the Issue or Dispute.
- B. The dates the Department Received the "Notice of Issue for Consideration" Conforming to Section 104.4.5(A) - Early Negotiations - Notice Required and the "Detailed Notice of Dispute" Conforming to Section 111.2.2.
- C. A list of all Contract provisions that is relevant to the Dispute and a Statement of which specific Contract provisions the Contractor believes controls the outcome of the Dispute.

D. A narrative setting forth the Contractor's position regarding additional compensation and time, if any, including all supporting facts including dates, locations, and items of Work affected by the Dispute, and how the Contract provisions set forth in subparagraph C support the Contractor's position.

E. A list of and copies of all documents that are relevant to the Dispute organized chronologically. With respect to each document, the list must include its date, the author(s) (including address and telephone numbers), and the recipient(s).

F. A list of all persons that is involved in or knowledgeable of the Dispute including addresses, and telephone numbers of such persons. If such person has knowledge of oral Statements upon which the Contractor is relying, the list must also include the substance of the oral Statements, the date(s) they were made, and all people present at the time the Statement was made.

G. If an extension of time is sought:

1. The specific Days or dates for which it is sought, including an explanation of impact on the Critical Path;
2. The specific reasons the Contractor believes a time extension should be granted;
3. The specific provisions of the Contract under which it is sought.

H. If additional compensation is sought, the exact amount sought and a breakdown of that amount into the categories provided by Section 109.7.3 - Compensable Items.

I. An oath consisting of the following language:

"ON OATH, and under the penalty of law for perjury or falsification, the undersigned, (Name of person signing oath and title) hereby certifies that the amounts claimed by the Contractor for additional compensation and time (as applicable) set forth in the Notice of Unresolved Dispute and this additional documentation are a true and complete Statement of the Actual Costs incurred and time sought, and are fully documented and supported in accordance with the Contract."

## J. Date of signature, sworn signature, and acknowledgment by notary.

The Director or the Director's designee may also retrieve and review the Bid Escrow Documentation, if any, if the Contract required submission of Bid Escrow.

111.3.3 Decision by Director Within 21 Days of receiving a Notice of Unresolved Dispute Conforming to Section 111.3.1 - Notice of Unresolved Dispute or, if requested, all Additional Documentation, whichever is later, the Director or the Director's designee(s) will Deliver a written decision. The decision will affirm, reverse, revise, or amend the decision of the Program Manager and/or request a Dispute Review Board (DRB) proceeding as provided in Section 111.4 - Dispute Review Board below.

111.4 Dispute Review Board If the Contractor wants additional consideration and the Director has not requested a DRB proceeding, the Contractor may Deliver a written request for a DRB proceeding to the Director within fourteen 14 Days of receiving the Director's decision as provided in Section 111.3.3 - Decision by Director.

Within 14 Days of receiving a request for a DRB proceeding ("DRB Consent Period"), the non-requesting party shall notify the other as to whether or not it consents to a DRB proceeding. If both parties consent, a DRB proceeding shall take place and shall conform to the Dispute Review Board Rules agreed upon by the Department and the Associated Constructors of Maine. If either party does not consent within the DRB Consent Period and the Contractor wants additional consideration, the Contractor must file an Appeal with the Commissioner as provided in Section 111.5.1 - Filing of Appeal. For a related provision, see Section 101.2 - Definition of Dispute Review Board.

The purpose of the DRB is to assist consenting parties in resolving Disputes in a manner that complies with the Contract and that is fair, impartial, less expensive, and less formal than litigation. The DRB will do so by issuing non-binding recommendations, unless the parties mutually agree in writing at the time of consenting to a DRB proceeding that such recommendations will be binding.

## 111.5 Appeal to Commissioner

111.5.1 Filing of Appeal If a DRB proceeding did not occur and the Contractor wants additional consideration, the Contractor must file an "Appeal of the Director's Decision" to the Commissioner within 14 Days of the expiration of the DRB Consent

Period. If a DRB proceeding did occur and failed to resolve the Dispute and/or the Contractor or the Director want additional consideration, that party must file an "Appeal of DRB Recommendation" to the Commissioner within 30 Days of the date the DRB's recommendation is final. At a minimum, the Appeal must contain:

- A. If a DRB proceeding did not occur, all Materials submitted to the Director and all decisions by the Director;
- B. If a DRB proceeding did occur, all Materials submitted to the Dispute Review Board and all recommendations from the Dispute Review Board;
- C. The specific findings of the Director and/or the Dispute Review Board that the appealing party claims are contrary to law and/or fact;
- D. Any other pertinent new documentary evidence;
- E. Any written arguments the appealing party wishes the Commissioner to consider; and
- F. The specific relief sought.

Unless directed otherwise by the Commissioner, review of the Appeal will be limited to the documentation submitted.

111.5.2 Rebuttal Information The non-appealing party will have 14 Days of receiving notice that an Appeal was filed with the Commissioner to submit written rebuttal information.

111.5.3 Time and Alternatives for Commissioner Action Within 30 Days of receiving an Appeal Conforming to Section 111.5.1 - Filing an Appeal or, if applicable, the Receipt of the rebuttal information allowed by Section 111.5.2 - Rebuttal Information, the Commissioner will:

- A. In writing, affirm the recommendation(s) of the Dispute Review Board or the decision of the Director, as applicable;
- B. In writing, revise, amend, or reverse the recommendation(s) of the Dispute Review Board or the decision of the Director, as applicable; or



C. In writing, submit the claim to binding or non-binding alternative Dispute resolution.

111.5.4 Final Agency Action Any affirmation, revision, amendment, or reversal by the Commissioner is final agency action as of the date of Receipt of such action by the Contractor. If the Commissioner submits the Dispute to alternative Dispute resolution, the date of final agency action will be established by the mediator, arbitrator, or other Dispute resolution neutral by written notice to the parties. If the Commissioner takes no action within such 30-day period, the DRB's final recommendation (if one exists) or the decision of the Director (if a DRB recommendation does not exist) shall be final agency action upon the expiration of said 30-day period.

111.6 Judicial Review The Contractor must comply with all of the notice and Dispute resolution provisions of this Contract in order to pursue judicial review. For related provisions, see Sections 111.1.2 - Escalation Process and 111.1.4 - Mandatory Notice.

All Bidders and the Contractor agree that any judicial review of any claim or cause of action arising from the Bid and/or the Contract must be commenced in the Superior Court of Maine, Kennebec County. Any petition for review must be in accordance with the Maine Administrative Procedure Act, 5 M.R.S.A. §11001, et seq. and Rule 80C of the Maine Rules of Civil Procedure.

## SECTION 112 - DEFAULT AND TERMINATION

Scope of Section This Section contains general provisions related to Default and termination of the Contract.

### 112.1 Default

112.1.1 Grounds for Default The Contractor and the Surety are in Default of the Contract if the Contractor or the Surety:

A. Fails to Promptly begin the Work under the Contract after being authorized to proceed,